No. 15,881

IN THE

United States Court of Appeals

For the Ninth Circuit

HUGH BRYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

ROBERT H. SCHNACKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for the United States.

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JURISDICTION.

Jurisdiction is invoked under Section 1001, Rule 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. 1291 and 1294 (1). In our opinion no jurisdiction exists for entertaining this appeal, since a denial of the motion under Rule 35 is not an appealable order. Arguments directed to this proposition will be covered in the brief which follows.

STATEMENT OF THE CASE.

Appellant was convicted of a violation of Section 1001 Title 18 U.S.C. for falsely swearing that he was not affiliated with the Communist Party in an affi-

davit filed with the National Labor Relations Board. He was sentenced to a term of 5 years on this count. Appeal was then taken to this Court and the judgment of conviction was confirmed. 238 F.2d 657. Certiorari was sought and denied. 355 U.S. 817. No contention was made in the original appeal that the sentence imposed was in violation of the statutes or the Constitution of the United States. Error was only assigned with respect to the trial itself. No contention was then made that a 5 year sentence was "cruel and unusual punishment." After the mandate of the Court of Appeals was filed in the District Court, a motion was made to modify appellant's sentence under Rule 35 of the Federal Rules of Criminal Procedure. No contention was made in this motion or in the affidavit which accompanied it that the sentence was in excess of the maximum authorized by statute, or that it constituted cruel and unusual punishment, or that it was an illegal sentence. The motion to modify sentence was denied. Appeal was taken from the order denying relief under Rule 35 of the Federal Rules of Criminal Procedure. Two so-called Statements of Points on Appeal were filed, one on January 15, 1958 (TR 24-25), and one on June 21, 1958. In the first Statement of Points no claim was made that the sentence imposed was contrary to law or that the sentence constituted cruel and unusual punishment in violation of the Constitution of the United States. Claim that the sentence was imposed in violation of law and the Constitution and that it constituted cruel and unusual punishment contrary to the 8th Amend-

ment was raised for the first time after proceedings had been commenced in the Court of Appeals to dismiss this appeal on the ground it was not appealable.

QUESTIONS PRESENTED.

1. Is a denial of a motion to modify sentence reviewable?

2. Did the Court abuse its discretion?

3. Is a 5 year sentence cruel and inhuman punishment contrary to the 8th Amendment?

ARGUMENT.

I. THE DECISION DENYING MODIFICATION OF SENTENCE IS NOT REVIEWABLE.[1]

This case involves an appeal from a decision of the District Court denying a motion to reduce sentence under Rule 35 of the Federal Rules of Criminal Procedure. No contention was made in the District Court that appellant received an illegal sentence. No contention was made there that the sentence violated any statute of the United States nor the Constitution of the United States. In particular, no contention was made in the District Court that the 5 year sentence concerning which the motion to modify was made constitutes "cruel and unusual punishment," nor that

[1]This question was raised by a preliminary motion, but we feel the decision on that motion merely indicated a desire to dispose of the question when the whole case was before the Court.

the procedure of the Court violated procedural due process of law.

In 1937 this Court in the case of *Benson v. United States,* 93 F.2d 749 (9th Cir.) held that a motion to vacate sentence is not an appealable order. In this case the defendants were sentenced after a plea of guilty to a term of 2 years. Later an application was made to vacate the sentence on a number of statutory and constitutional grounds. After reviewing the predecessor statute to Section 1291 of Title 28 United States Code respecting "final decisions" of the District Courts, the Court then stated, "It is conclusively settled that a ruling upon a motion to vacate a judgment, made in the same term and the same cause in which the challenged judgment is entered, is not an appealable order. *Connor v. Peugh's Lessee,* 18 How. 394, 395, 15 L.Ed. 432; *Phillips v. Negley,* 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013; *Hume v. Bowie,* 148 U.S. 245, 255, 13 S.Ct. 582, 37 L.Ed. 438; *Stevirmac Oil Co. v. Dittman,* 245 U.S. 210, 214, 38 S.Ct. 116, 62 L.Ed. 248; *Smith v. United States,* (7th Cir.), 52 F.2d 848, and cases cited; *Board of Supervisors v. Knickerbocker Ice Co.,* (2nd Cir.), 80 F.2d 248, 250; *Republic Supply Co. v. Richfield Oil Co.,* (9th Cir.), 74 F.2d 909, 910, and cases cited."

The particular situation which was involved in the *Benson* case has been corrected by the enactment of Section 2255 of Title 28 United States Code, which provides for appeal when an illegality attaches to the sentence itself. It would appear, however, that the general rule announced in the *Benson* case still ap-

plies with respect to those matters not covered by Section 2255.

In *Biren v. United States,* 202 F.2d 440 (9th Cir.), the appellant there was sentenced to a term of 5 years after a plea of guilty. Thereafter he moved to modify the sentence. This Court dismissed the appeal stating that "Appeal is dismissed: (1) Because that order was not a final decision within the meaning of 28 U.S.C. (a), Section 1291, and was not appealable . . ." The *Biren* case also is a holding by this Court that motions to modify on the grounds that sentence is excessive and not on the ground that the sentence is in excess of the maximum prescribed by law is not an appealable order. It is, of course, hornbook law that an ancillary motion does not become appealable merely because there are no further proceedings available in the District Court. In a criminal case, for most purposes, the only "final decision" is the judgment of conviction.

In the recent case of *Flores v. United States,* 238 F.2d 758 (9th Cir.) this Court was faced with an appeal from a denial of a motion under Rule 35 of the Federal Rules of Criminal Procedure. The sentences were 30 and 20 years. The Court stated that neither a letter from the appellant nor the motion filed by his counsel invoked Section 2255 Title 28 United States Code. The only formal appeal which was before the Court was an appeal from a denial of a motion under Rule 35. No contention was made in the Trial Court that the sentences were illegal. Flores was complaining merely of what in his view was the

over-severity of the sentences, in view of the nature of the offense.

This Court was, therefore, squarely presented with a question of whether or not a decision under Rule 35 was an appealable order. The Court considered this case not under Rule 35, but under Section 2255 of Title 28 United States Code. There is no escape from the conclusion that the Court regarded and held that there was no appeal possible from the Court's decision under Rule 35.

No conceivable difference can be found in the situation present in the instant case and that involved in *Flores v. United States,* except that Flores received a longer sentence. This Court stated in the *Flores* case, referring to the contention made that the sentences were too severe, "In their motions for reduction of sentence appellants presented general considerations which, in their view, should lead the trial judge to modify the sentences. No contention was made, however, that the sentences were in excess of those authorized by statute or that they imposed cruel and unusual punishment contrary to the 8th Amendment or that the judgments were in any other respects void.

"The motions which were considered and denied were, therefore, addressed solely to the discretion of the trial judge. This Court has no control over a sentence which is within the limits allowed by statute." At page 759. (The Court held these questions could not be raised for the first time on appeal.)

Mr. Bryson also did not complain that his sentence was in excess of that authorized by statute or that it constituted cruel and unusual punishment or that the judgments were void in the District Court. In no respect, therefore, can it be said that Mr. Bryson's situation differs from Mr. Flores, with respect to the contentions advanced by him below.

In *Kimbaugh v. United States,* 199 F.2d 453 (5th Cir. 1952), the Fifth Circuit expressly stated that a refusal to reduce sentence under Rule 35 is not appealable. Diligent examination has failed to discover any case in any circuit, or the Supreme Court of the United States, where a motion under Rule 35 of the Federal Rules of Criminal Procedure to reduce sentence has ever been considered on appeal.

Such a holding would be a novelty which would have serious consequences for both this Court's calendar and for the delicate relationship of jurisdiction between trial and appellate courts. As far as we can discover, the discretion of the trial court to refuse to modify a concededly legal sentence has never been challenged by any United States Court.

Here admittedly the motion made was addressed to Judge Mathes's discretion. There is no contention that Judge Mathes failed to entertain the motion addressed to his discretion. There is merely the contention that he should have come to a different conclusion from that which he did. Judge Mathes nowhere stated that he lacked the power to grant the motion to modify—he simply indicated that in his discretion his decision was not to modify.

This case concerns a usual motion made in criminal cases; one might almost say the invariable motion made after sentence. By deciding that the order is appealable this Court would invite a veritable flood of appeals from any defendant who feels the sentence he has received is too great. We know of few cases in which any defendant who has received a sentence of imprisonment has not believed that the sentence should be reduced and that the Court abused its discretion in not granting modification. It is not in the nature of human beings to believe that any jail sentence they receive is proper.

Almost every criminal case which this Court decides, would involve a second and subsidiary appeal after the mandate to test the question whether the Court abused its discretion in failing to modify the sentence previously imposed. Furthermore, the Court would be faced with hundreds of other appeals whose only point is that the Judge should have modified the previously imposed sentence because of some change of circumstance occurring since conviction which makes the sentence in some way harder to bear. Implicit also is the proposition that a Court of Appeals can govern the length of a sentence concededly within the maximum. If the Court can take cognizance of an appeal from a refusal to modify a previously unchallenged sentence, *a fortiori* the length of the sentence can be challenged on appeal from the sentence itself. If appealable at all, the length of a sentence must be gone into in every case now before or which hereafter may be before the Court.

We intend hereafter to show that the power to review sentences was not granted in Section 1291 of Title 28 but we submit to the Court that it is unequipped to rule on such a question even under some strained interpretation which would allow it statutory authority. This Court has neither a probation officer nor a defendant present before it. It did not have the opportunity to personally observe the evidence as it unfolded during the trial. The Court of Appeals in the nature of things is more concerned with the working out of legal rules than with the day to day fixing of punishment. Each defendant is an individual case when it comes to imposing sentence. His hopes and fears and the interest of society in protection from his depredations cannot be satisfied by legalistic formulæ nor on the basis of a cold printed or typewritten record of proceedings.

Nor can it be said that review of a refusal to reduce sentence does not involve the sentencing process. By saying that a sentence is too severe the Court does not escape the responsibility and the practical effect of resentencing. This Court must, if it assumes that responsibility, decide how much is too much. More than that, the Court must decide in a case where no change of circumstance has been alleged that a Court is required to change its decision. It must, therefore, not only fit the judgment to the particular defendant in the first instance, but decide whether or not events of both a nature personal to the defendant and changes in general conditions require a new and different judgment.

We do not anticipate that the Court will desire in many cases to change the judgment at the time of sentencing or at the time of motions to modify from that imposed by the District Court. We do not see, however, how, granting the appealability of these orders of the District Court, this Court can evade the responsibility of examining each and every sentence which is appealed to it. Furthermore, we cannot see how this process can lead other than to a diminution of the prior authority of the District Court.

Carried to its logical conclusion—what such a decision means practically is that a defendant will be sentenced once by the District Court, once by the Court of Appeals, once by the Supreme Court of the United States and possibly around and around again. We realize that this system of sentencing is a possible one; we submit, however, it is not the system of criminal law which was established by Congress and the Constitution, nor is it desirable.

II. "A DENIAL OF A MOTION TO MODIFY IS NOT A FINAL DECISION" UNDER SECTION 1291, TITLE 28 UNITED STATES CODE.

The most obvious analogy to a motion to modify a judgment in a criminal case is a motion to modify a judgment or finding in a civil case. The 8th Circuit in *United States v. Nuschang,* 156 F.2d 196 (8th Cir.), in a well-reasoned opinion discussed this question. In the 8th Circuit's opinion the function of a motion for modification or for a rehearing in a civil

case is merely to afford the Trial Court an opportunity to reconsider action already taken. The appeal is not from the denial of such a motion but from the underlying judgment challenged by the motion.

Both the civil and the criminal rules contemplated a motion for a new trial, or for reconsideration of action taken by the Trial Court having the effect of extending the time for appeal from the judgment sought to be effected until final disposition of the motion. As the Court stated, "This does not mean, however, that an order disposing of such a motion is an appealable order or that an appeal from it brings up for review the question of the legality of the judgment." Simply stated, the provisions for modification are simply an opportunity given by the law to afford a Trial Court an opportunity to re-examine its conclusions. If those conclusions were wrong it is the function of the appeal from the judgment itself to say so. A refusal to modify cannot affect the validity of an action which was proper in the first instance. In effect all the Judge can say is that I adhere to my former determination. If that determination was right then the manner in which the Court says, "No, I will not reconsider it," should have no effect whatsoever.

This Court considered this problem in *Libby McNeil and Libby v. Alaska Industrial Board,* 215 F.2d 781 (9th Cir.). In that case the appellant appealed from a motion denying a new trial. This Court held "An order denying a motion for a new trial is not the kind of 'final decision' contemplated by the stat-

ute (28 U.S.C. 1291)." The Court thereupon dismissed the appeal despite the fact that no appeal was taken from the underlying decision on which a motion for a new trial was made. As this Court stated in aonther case involving *Libby Company—Libby McNeil and Libby v. Malmscold,* 115 F.2d 786 (9th Cir.), "The fact that the order refusing a new trial may be an abuse of discretion which would justify its consideration by Appellate Court does not make the order itself appealable. The review must be incident to appeal from an Appeal Board, such as the final judgment." The final order in a criminal case is the judgment of conviction. *Benson v. United States,* supra. No reason has been shown in this case why any questions dealing with the length of appellants' sentence could not have been dealt with at the time of that appeal.

Another situation which comes readily to mind is that involving the granting of probation. A revocation of probation, of course, involves different considerations from those in a reconsideration of sentence. A revocation of probation can only take place when a defendant has failed to meet some of the conditions of the probation. Title 18 U.S.C. Section 3653. Revocation of probation involves the judicial establishment of facts; while not a formal procedure, it nevertheless contemplates some sort of hearing. The granting of probation, however, is entirely within the province of the District Court and this Court has held that the exercise of the power of the District Court cannot be questioned on appeal. *Elder v. United*

States, 142 F.2d 199 (9th Cir.), see also *Burr v. United States,* 86 F.2d 502 (7th Cir.); *Evans v. District Judge,* 12 F.2d 64, 65 (6th Cir.). As the Supreme Court stated in *Burns v. United States,* 287 U.S. 216, "Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain." At page 220.

The granting of probation is thus one of those areas of authority on the part of the District Court which has not been given by Congress to the Court of Appeals. A failure to grant probation cannot be the subject of an appeal, since the matter lies entirely within the discretion of the Trial Court. Matters entirely within the discretion of a Trial Court cannot be made the basis of appeal. *United States v. Rio Grande Dam and Irrigation Company,* 184 U.S. 416.

A refusal to grant probation is analogous to a refusal to change the terms of a previously pronounced sentence. In both cases what is involved is an act of grace on the part of the Trial Court. As the Court stated in the *Burns* case, "It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing."

Reasonable minds may differ on the sentences which should be imposed in a specific case. Under the Uniform Code of Military Justice it is possible for the reviewing authorities to reduce a sentence. Article

666 of the Act of May 5, 1950, 64 Stat. 108, 50 U.S.C. Chapter 22. No comparable authority has been granted to Federal Appellate Courts. It is too clear to require much argument that by determining whether a Court has abused its discretion in refusing to reduce a sentence an Appellate Court is actually instructing the Trial Court what sentence it should in fact impose.

The sentence in this case was 5 years. If review is had the Court must at least answer by how many years the Trial Court abused its discretion. That is to say, the Court must state whether 4 years or 3, or possibly even 2 constituted a sentence within the Court's discretion to refuse to modify.

As a matter of simple logic, there seems to be no reason, if this Court can determine how much is a proper sentence, why it cannot—by referring to the printed record before it—determine that probation would be a proper disposition of the case.

In *Brown v. United States,* 222 F.2d 293 (9th Cir.) the Court observed, "If there is one rule in the Federal criminal practice which is firmly established, it is that the Appellate Court has no control over a sentence which is within the limits allowed by statute." By reviewing "the discretion" of the District Court over either the severity of a sentence or a refusal to modify a sentence which is within the maximum allowed by law, this Court would exercise control over sentence. It in fact would either directly or indirectly resentence defendants without the information and opportunity for study which is at the dis-

posal of the District Court. We submit that such a result is not within that contemplated by Congress by the enactment of Section 1291 of Title 28 United States Code.

III. JUDGE MATHES DID NOT ABUSE HIS DISCRETION.

In Section III of his brief appellant attacked Judge Mathes's exercise of discretion on the grounds that his motives were arbitrary and capricious; that he analogized the 1001 violation there present to Smith Act violations; that he denied his power to reduce sentence because of his belief that appellant was still a Communist; and that he insisted that appellant declare adherence to the system to which the Judge was dedicated. While not expressly stated, it is implied that probation should have been granted. The purpose of Rule 35 is claimed to be, in part, to permit the Court to impose "probation" (Page 20, Appellant's Brief).

We should remind appellant that Rule 35 of the Federal Rules of Criminal Procedure does not provide for the granting of probation after a sentence has been imposed. Section 3651 provides that probation may be granted "upon entering a judgment of conviction" of an offense. The Supreme Court has held in *Affronti v. United States,* 350 U.S. 79, and *United States v. Murray,* 275 U.S. 347 that this section does not allow probation to be granted after imposition of sentence. The only question here involved then is Judge Mathes's discretion in refusing to modify the sentence of 5 years.

The offense in this case involves the submission by a Labor Union Official of a false affidavit concerning his affiliation with the Communist Party of the United States. At the time of the hearing Judge Mathes made reference to the fact that he had presided at a Smith Act trial in the City of Los Angeles involving members of the Communist Party. He nowhere expressly referred to the Smith Act by way of analogy in this case. It is not clear from appellant's brief, page 21, whether he is referring to the time of imposition of sentence in this case or to the denial of motion to modify. If he is referring to the time of original sentence, the simple answer is that he did not appeal on that ground from any remarks made at that time. If he is referring to the hearing on the motion to modify, Judge Mathes made no such statement. A discussion of the Communist Party and offenses which involve the Communist Party would, however, seem germane in imposing judgment or reviewing to modify judgment in a case in which the crime consists of falsely swearing that one was not affiliated with the Communist Party. Congress imposed a requirement on Unions taking advantage of the National Labor Relations Act that their leaders file affidavits that they were not affiliated with the Communist Party. Mr. Bryson's affiliation with the Communist Party was the basis of his conviction. We think it plain that a Judge has as much right to consider the cases of other Communist Party members whom he has sentenced as he has to consider other bank robbers he has sentenced when sentencing one

who has robbed a bank. Appellant seems to imply that membership in or affiliation with the Communist Party is such a mark of honor that considering it adversely, to a defendant who is charged with falsely swearing about it, is a deprivation of rights under the Constitution of the United States. We do not think we can be called "red baiters" when we suggest that in a crime which involves an attempt by one affiliated with the Communist Party to take advantage of the National Labor Relations Act contrary to the will of Congress, it is proper to consider Communism, prior sentence meted out to Communists and the nature of the Communist movement.

Appellant suggests that Judge Mathes was of the opinion that he lacked power to reduce a sentence because of his belief that appellant was still a Communist. Appellant's brief page 21. An examination of the transcript does not indicate that Judge Mathes was of that opinion. It was not that he *could not* but rather that he *would not* reduce the sentence because he was not convinced that Mr. Bryson had given up all adherence to Communism. Judge Mathes said, "In short, Gentlemen, I can't bring myself to grant the motion." This does not indicate a failure to exercise discretion but rather a studious examination of the facts and the defendant, and a decision that appellant had failed to show any change of circumstance which would justify a change in the sentence.

Appellant claims that the transcript indicates that Judge Mathes believed appellant still a Communist. We submit that Judge Mathes's remarks cannot be

so interpreted. Rather Judge Mathes indicated that he was not convinced to the contrary. In short, he merely indicated that at the hearing appellant had failed to prove that he was not. If appellant had been an alcoholic in the past, a Judge faced with a motion to modify sentence might indicate that he was not convinced of the defendant's reformation. This attitude on the part of the Court is possible even though the Court had no fixed belief that the defendant still drank. In brief, Judge Mathes simply indicated that he was not persuaded that appellant was no longer a Communist.

Appellant declares that a requirement on the part of the Court that a defendant be "dedicated today to defend our system which I have sworn to uphold" is unjudicial. We were under the impression that Judges were sworn to uphold the Constitution of the United States and that there was such a thing as an American system of government. It is our feeling that a Judge can conscientiously require a defendant seeking to modify his sentence to be dedicated to the American system of government and to the Constitution of the United States.

Appellant claims a belief that he was still a Communist would be contrary to the record. We do not assert that appellant still is or is not a Communist. We do assert, however, that the record at the motion to modify is silent in that respect. Appellant vehemently asserts that the uncontradicted evidence indicates that appellant had not been a Communist since 1947. We might remind appellant that he was con-

victed for falsely swearing in April 1951 that he was not affiliated with the Communist Party. In July 1951 appellant asserted to one John Tiernan that "I am still a Communist and proud of it." Trial Record 697. In July of that year he also told a Mr. Stewart, a member of the Marine Cooks and Stewards Union, that he was a Communist and proud of it. Trial Record 557-648.

The Trial Record indicates that in 1947 it was agreed at a Communist meeting at which Mr. Bryson took an active part that if compliance with the Taft-Hartley Act was necessary "it would be understood that they would resign from the party in name only so they could comply, but this did not mean that they would not be in touch; in close alliance with the party; they would still be informed of all major decisions and policies of the party." Trial Record 504.

The record of the trial coupled with appellant's conviction of false swearing did not require the trial Judge to find that appellant had not been a Communist since 1947. Even if Mr. Bryson had asserted at the hearing that he was not a Communist (which as a matter of fact he did not) the trial Judge was still not required to believe him. A discussion of appellant's supplementary affidavit which was filed *after* the hearing on the motion to modify of course is not germane to the question of whether or not Judge Mathes abused his discretion at the time of the hearing.

The suggestion is made at page 21 of Appellant's Brief that Judge Mathes was prompted by "arbi-

trary or capricious motives." Appellant never directly states what he believes the arbitrary and capricious motives to be. He, however, seems to indicate that they consisted of the trial Judge's strong feeling about Communists and Communism in the United States. Appellant's Brief page 24.

We cannot bring ourselves to believe that having strong feeling about Communism and Communists is unjudicial or that a Judge with such beliefs cannot exercise discretion. It has never been suggested, to our knowledge, that for a Judge to try or pass on criminal cases involving Communist defendants he must be in favor of Communism or adopt a neutral attitude towards it. We do not think a Judge is disqualified or has arbitrary or capricious motives because of strong feelings concerning Communism any more than he would be if he had strong feelings against bank robbery, murder, arson or rape.

IV. NO QUESTION CONCERNING "CRUEL AND UNUSUAL PUNISHMENT" CAN BE RAISED OR IS PRESENT IN THIS CASE.

Appellant argues that the imposition of 5 years' imprisonment and a $10,000.00 fine for appellant's false denial that he was affiliated with the Communist Party constitutes cruel or unusual punishment in violation of the 8th Amendment of the Constitution of the United States. A sentence within the limits fixed in a statute will not ordinarily be disturbed on appeal as being excessive, cruel or inhuman. *Troutman v. United States,* 306 U.S. 649; *McManus v.*

United States, 306 U.S. 651; *Martin v. United States,* 100 F.2d 490.

Appellant argues that there should be some distinction in the penalty between violent overthrow of the Government, membership in the Communist Party and affiliation with that organization, and claims that the lack of this distinction makes such a punishment for affiliation cruel and unusual within the meaning of the Constitution. It is illogical to jump from a claim that differentiation in terms is desirable to the assertion that its lack is unconstitutional. An examination of Title 18 will demonstrate that a 5 year term is the usual term fixed therein. Transporting a woman in interstate commerce for immoral purposes which has the same penalty as transporting a stolen automobile does not make a 5 year term for transporting the stolen car unconstitutional, and a 10 year penalty for forgery of a $2.00 treasury check is not unconstitutional because the penalty for sale of narcotics may be only 5 years. Furthermore appellant is confused as to the crime of which he was convicted. Section 1001 is the crime of false swearing. The particular connections with the Communist Party referred to by appellant are simply requirements of the National Labor Relations Act. None of these false oaths would come under the category of "little white lies." The crime committed is in the nature of perjury. No particular differentiation between the subject matter of false oaths in this field would appear to be necessary or desirable.

In *Weems v. United States,* 217 U.S. 349, the Supreme Court was faced not only with a long prison term but with the perpetual wearing of chains and with the imposition of hard and painful labor. From a defendant's point of view the imposition of any sentence at all is excessive and disproportionate to his offense. An objective comparison of a 5 year sentence with those imposed generally in the Federal judicial system, however, demonstrates that such sentence is neither cruel nor unusual. In *Edwards v. United States,* (10th Cir.), 206 F.2d 855, the Court imposed a 5 year sentence for possession of a bottle of bootleg whiskey. Falsely swearing one was not affiliated with the Communist Party would seem at least as serious. The Court held in the *Edwards* case, however, such a punishment was not within the prohibition of the 8th Amendment. In *Hornbrook v. United States,* (5th Cir.), 216 F.2d 112, the Court dismissed as frivolous the contention that a 5 year sentence for violation of the Dyer Act was cruel and unusual. We think the same disposition should be made here.

Appellant may not raise the question of cruel and unusual punishment here in any event. Appellant did not claim at the time of sentence that it was either excessive or in violation of the Constitution. He did not make this claim at the time of appeal from the judgment of conviction or in his petition for a writ of certiorari. He failed to assert the constitutional question in the Court below. As a matter of fact his assertion even here was belated, since such a conten-

tion did not appear in his first so-called Points on Appeal. In this Circuit such a contention cannot be advanced for the first time on appeal. *Flores v. United States,* (9th Cir.), 238 F.2d 758. In the *Flores* case, when faced with a contention for the first time on appeal that the sentences of 30 and 20 years were cruel and unusual punishment, this Court of Appeals stated "None of these contentions was advanced in the trial court and for this reason alone cannot be considered here."

V. THE COURT DID NOT APPLY IMPROPER STANDARDS IN DENYING APPELLANT'S MOTION.

Appellant claims that Judge Mathes used improper standards in denying his motion on two grounds: 1. That he mentioned that he did not believe appellant was dedicated to the system which the Judge was sworn to uphold; and 2. That the Judge improperly took into account a belief that appellant had not renounced Communism.

As we have said before we think that a Judge properly should take into account in sentencing or passing on a sentence whether or not a defendant supports the Constitution of the United States and the American system of government. A lack of attachment to the United States and to its institutions is a factor which any Court should take into account in imposing judgment. Our Court system has been called "the bulwark of American democracy." We see nothing inappropriate in the Court's considera-

tion of attachment to the United States as a requirement for the exercise of mercy. We submit that every member of the Court of Appeals is attached to the American system of government and if called upon to exercise mercy would consider whether or not the defendant before him was also so attached.

Appellant seems to argue that Judge Mathes was required to accept in the hearing on the motion to modify appellant's supplementary affidavit filed after the hearing which states: "I am not in favor of Communism. I am against it." TR 28. To begin with it would have been somewhat difficult for the Judge to pass on a statement which was not made at the time of his decision. Secondly when a defendant stands convicted of false swearing we see no reason why a Judge should be required to believe every statement made by him. An examination of the first affidavit, while indicating that appellant was superficially, at least, living a conforming life, shows nothing which would justify appellant's assertion that the record shows that appellant was not at the time of the motion in favor of or affiliated with the Communist Party. In a prior section of this brief we have indicated some of the testimony at the trial which would justify a certain skepticism concerning appellant's presently claimed attitude toward Communism.

To some extent an analysis of the legal principles advanced by appellant in his improper standards claim would be futile. Nothing improper has in any sense been shown. Even assuming that such a claim might in some case be a grounds for reversal, noth-

ing has been shown here which by any stretch of the imagination indicates that improper standards have been applied.

It should be observed, however, that no case has been presented by appellant in which an Appellate Court disturbed the discretion of a trial court in reviewing to modify a conceding legal sentence. *Wilson v. United States,* (9th Cir.), 250 F.2d 312, involved a trial and the standards required of a trial. Other cases concern the imposition of sentence itself rather than an attempt to modify after affirmance on appeal.

The per curiam opinion in *Vetterle v. United States,* 344 U.S. 72, is a slender reed on which to overrule the mass of law which holds, as this Court did, that an Appellate Court has no control over the sentence which is within the limits allowed by statute. *Brown v. United States,* (9th Cir.), 222 F.2d 293. In the *Vetterle* case the Supreme Court obviously did not consider the implications of their action. We think a full-scale consideration by the Supreme Court is required before Courts of Appeal are authorized to review sentences. No principle of law is announced in the *Vetterle* case and the cases which moved the Supreme Court to remand the case are not clear from the record. In *Calvaresi v. United States,* 348 U.S. 961, a resentence was not ordered, but a retrial before a different Judge. All that apparently was wrong with the judgment was the length of the sentence. The Supreme Court, however, did not indicate that a resentencing procedure should be had before a different Judge but on the contrary sent the case back for a

retrial. If any case would have justified the kind of treatment which appellant urges here, *Calvaresi* would have. The Supreme Court, however, apparently felt it did not have the authority to resentence, or to demand resentence, or remand for resentence, where the length of the sentence alone was involved. If *Vetterle v. United States,* supra, meant anything at all, it was apparently overruled in the *Calvaresi* case decided shortly thereafter.

The remainer of the cases cited by appellant deals with contempt. Contempt is, of course, *sui generis.* In a contempt case there is no maximum sentence. Therefore, the problem of an Appellate Court reviewing a sentence within the maximum provided by law is not involved. In a contempt case the Court acts as Judge, complaining witness—and in many cases, prosecutor, unfettered by a Congressionally determined maximum sentence. In the Bryson case, however, the issue is whether a denial of a Motion to Modify is reviewable where the sentence sought to be modified is within the maximum provided by the statute.

It has been the rule for many years that a contempt sentence, where no maximum penalty is provided, may be reviewed to determine whether or not it is excessive. In *Sinclair v. United States,* 279 U.S. 749, the Supreme Court reviewed the question of the excessiveness of a contempt sentence. In *United States v. United Mine Workers,* 330 U.S. 258, the Supreme Court actually reduced a fine in a contempt case involving a Trade Union. In *Green and Winston*

v. United States, 26 LW 4183, the Supreme Court also reviewed the sentences imposed there for contempt of Court. In the *Green* case the Supreme Court reiterated its view that because "Congress has not seen fit to impose limitations on the sentencing power for contempts" therefore "Appellate Courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed." Because of the unique nature of the contempt power, the Supreme Court indicated that there must be careful supervision. Nowhere, however, have the Courts stated that the general rule regarding sentences which are imposed within the maximum provided by law has been abrogated.

In *Yates v. United States,* 26 LW 4277, the Supreme Court introduced no new and novel rule; it simply proceeded under the very limited exception to that rule with respect to contempts. Furthermore, the Supreme Court, after reffirming its power in contempt sentences, emphasized its reluctance to do so—even in this limited type of case, saying, "Such a reduction of the sentence, however, normally ought not be made by this Court."

Contempt sentences are simply unique; they are usually imposed, not for the protection of society in general but for the protection of the judicial processes and the decorum of the Court. As such, they are primarily the responsibility of the Court system, rather than the other arms of Government. Since the conduct is usually entirely within the presence, either

actually or constructively, of the Court, and all the facts necessary for sentence are usually in the record of proceedings, there is abundant justification for treating them differently than the ordinary criminal sentence.

It should be emphasized that we are dealing here not with a sentence but an attempted modification. Appellant utterly confuses the question of the sentence's severity with the Judge's power to refuse to modify it. He did not appeal on the grounds that the sentence was excessive. Any contention which he advances toward the question of the sentence itself is already *res judicata.* The only claim which can be advanced at this time by appellant is that the trial Judge lacked the power to refuse to modify an appellate court approved sentence.

CONCLUSION.

In our opinion the type of order involved here is not appealable or reviewable. We believe that even if the Court of Appeals assumes jurisdiction to review, the matters urged are frivolous. We ask that the order of the District Court be affirmed or in the alternative the appeal dismissed.

Dated, San Francisco, California,
September 10, 1958.

ROBERT H. SCHNACKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for the United States.